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EXAMINER

DAWSON, GLENN K

ART UNIT PAPER NUMBER

3731

DATE MAILED: 04/17/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/810,988

Applicant(s)

SCHEUCH ET AL.

Examiner

Glenn K. Dawson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 February 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 22-25 and 28-35 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 22-25 and 28-35 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 22,25,28,29,30,31,32 and 35 are rejected under 35 U.S.C. 102(b) as being anticipated by Goodman, et al.-5813397.

Goodman discloses a system of a ventilator which provides doses of an aerosol according to a patient specific protocol or regimen. Either a programmable microprocessor or a canister with a readable bar label has inputted therein patient and aerosol parameters (e.g. particle size distribution, pulse length and duration) into its memory. This memory is read and used to alter or adjust the operating parameters of the ventilator and aerosol device to provide the proper regimen. The device has the capability to detect changes in the patient's pulmonary functions or flow patterns including flow rate and tidal volumes and adjust these parameters. The inputted parameters can be requested by the microprocessor and obtained through a conventional external communications port. The operating parameters can be loaded from a library or from an external source in order to accommodate patient specific requirements. Patient parameters would inherently include any information regarding a

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particular patients' requirements with respect to the ventilation which is to be delivered... e.g. specifics of pressures, flow volumes, pulse durations, etc. . These would be the parameters that the system would need to perform its intended operations. Therefore, patient parameters are indeed stored into the systems memory and are used to set and then checked during use to alter the operating parameters during use to ensure that the patient was being adequately or properly ventilated. The limitation of claim 35 would be met by the timing of the ventilator with regards to pulse frequency, as any down time between inhalations as prescribed by the programming of the ventilator which would require or cause the normal inhalation-exhalation breathing cycle to include blocks (or stops) of delivering of drug until the next inhalation. See col. 21 lines 30-42; col. 31 line 15- col. 32 line 67; col. 34 lines 30-46; col. 35 lines 1-2 and 63-65. Additionally see abstract lines 14-21; col. 5 lines 8-24; col. 6 lines 1-33; col. 8 lines 28-47; col. 12 lines 47-53; col. 15 lines 37-55; col. 16 lines 11-27; col. 21 lines 43-52; col. 31 lines 3-14; lines 30-40,51-62; col. 31 line 67-col. 32 line 7; col. 34 lines 30-34.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 23,24,33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Goodman, et al.-'397 in view of Wallace, et al.-6024089.

Goodman discloses the invention as claimed with the exception of the specific inputting means.

Wallace discloses the use of manually inputting means to input patient or ventilator parameters into the ventilator. It would have been obvious to have provided manual inputs for the ventilator so that it could be used if necessary even if the memory or labels were not present. To have used a modem connected to the disclosed

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conventional external communications port of Goodman, would have been obvious as modems were well-known at the time of the invention to be communication devices which allowed for remote data communication.

Claims 22,24,25,28-32,34 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gilmore, et al.-5931160 in view of Rapoport, et al.-5490502.

Gilmore discloses a ventilator control system and method where the system includes a user interface, a memory and a processor. The user interface allows for manual input of patient data and aerosol parameters. Upon downloading of the information which can be chosen from a set of patient-specific protocols placed in the systems memory, the processor is able to adjust the operating parameters of the ventilator. See col. 3 lines 40-56; col. 5 lines 22-33; col. 8 lines 40-53; col. 19 lines 18-31. However, Gilmore does not disclose the inserting of a memory medium into a device of the system. However, Rapoport, et al. discloses the placing of operating parameters on a memory card for operating a ventilator. See col. 14 lines 18-20 and 50-58 and line 66 –col. 15 line 12. It would have been obvious to have used a memory card to hold the specific data needed to program the ventilator for providing proper gas administration to a particular patient as it would make the system more user friendly. The limitation of claim 35 would be met by the timing of the ventilator with regards to pulse frequency, as any down time between inhalations as prescribed by the programming of the ventilator which would require or cause the normal inhalation-exhalation breathing cycle to include blocks (or stops) of delivering of drug until the next inhalation.

Claims 23 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gilmore, et al.-'160 in view of Rapoport, et al.-'502, as applied to the claims above, and further in view of Goodman-5813397.

Gilmore as modified by Rapoport make obvious the invention as claimed with the exception of the modem up or downlink.

Goodman discloses a system of a ventilator which provides doses of an aerosol according to a patient specific protocol or regimen. Either a programmable microprocessor or a canister with a readable bar label has inputted therein patient and aerosol parameters (e.g. particle size distribution, pulse length and duration) into its memory. This memory is read and used to alter or adjust the operating parameters of the ventilator and aerosol device to provide the proper regimen. The device has the capability to detect changes in the patient's pulmonary functions or flow patterns including flow rate and tidal volumes and adjust these parameters. The inputted parameters can be requested by the microprocessor and obtained through a conventional external communications port. See col. 21 lines 30-42; col. 31 line 15- col. 32 line 7; col. 34 lines 30-46; col. 35 lines 1-2 and 63-65. Additionally see abstract lines 14-21; col. 5 lines 8-24; col. 6 lines 1-33; col. 8 lines 28-47; col. 12 lines 47-53; col. 15 lines 37-55; col. 16 lines 11-27; col. 21 lines 43-52; col. 31 lines 3-14; lines 30-40,51-62; col. 31 line 67-col. 32 line 7; col. 34 lines 30-34.

To have used a modem connected to the disclosed conventional external communications port of Goodman, would have been obvious as modems were well-

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known at the time of the invention to be communication devices which allowed for remote data communication.

Goodman clearly states that the device is intended to be flexible enough to use with a specific patient by reading information concerning operating parameters (at least aerosol parameters and most probably patient parameters) from a local or external memory source for customizing use by a specific patient. See col. 31 lines 3-14. The device can be remotely re-programmed or can rely on information on a label to change the operating parameters of the device. The code on the label causes the device to change its operating parameters. It is clear that the device is given information regarding both patient parameters and aerosol parameters, stored in memory either in a library, a microprocessor or on a label and upon reading the information, changes the operation of the device.

Response to Arguments

Applicant's arguments filed 02-10-2006 have been fully considered but they are not persuasive.


As pointed out above, the claimed inserting of a memory medium into the device containing a plurality of individual patient parameters is indeed met by Goodman as it would be the only way that the ventilators operating parameters could be altered to provide effective ventilation to a specific patient.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn K. Dawson whose telephone number is 571-272-4694. The examiner can normally be reached on M-Th 7:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anhtuan T. Nguyen can be reached on 571-272-4963. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


Glenn K Dawson
Primary Examiner
Art Unit 3731

Gkd
14 April 2006